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# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK, *et al.*,

*Petitioners,*

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI* [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates.

The ACLU was founded in 1920. For more than 75 years, it has steadfastly defended the First Amendment rights of unpopular speakers and has appeared before this Court in numerous First Amendment cases arguing against unjustified restrictions on speech. Most notably, the ACLU served as counsel in *Hague v. CIO*, 307 U.S. 496, 515 (1939), which first articulated the principle that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

For more than three decades, the ACLU has also been in the forefront of the battle for reproductive rights. In 1971, the ACLU served as counsel in *United States v. Vuitch*, 402 U.S. 62 (1971), the first abortion case argued in this Court. Three years later, the ACLU established its Reproductive Freedom Project. Since then, the ACLU has participated in virtually every major abortion case in this Court either as direct counsel or as *amicus curiae*.

This case, of course, involves the right to protest outside abortion clinics. It has therefore been cast by some as a clash between the First Amendment and reproductive rights. The ACLU believes that dichotomy is a false one

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

and that the proper resolution of the case must preserve *both* rights. To that end, we respectfully submit this brief in the hope of assisting the Court in drawing the proper constitutional lines.

The American Jewish Congress is a national organization of American Jews founded in 1918 and committed to the preservation of the civil liberties and civil rights of Jews and of all Americans. The American Jewish Congress has filed many briefs in this Court supporting First Amendment rights and free expression. In addition, the American Jewish Congress believes that a woman's freedom to choose whether, when, or if to bear children, and to obtain medical and counseling services in connection with that freedom, must and should be protected as an essential constitutional liberty. The American Jewish Congress believes that the injunction at issue, which establishes content-neutral regulations for anti-choice demonstrations, appropriately respects the free speech rights of such demonstrators while protecting women's freedom of reproductive choice.

The American Jewish Committee is a national organization of 50,000 members, founded in 1906, for the purpose of protecting the civil and religious rights of Jews. The American Jewish Committee believes that this goal can best be accomplished by preserving the constitutional rights of all Americans, including the fundamental right of access to abortion, as set forth in *Roe v. Wade*, 410 U.S. 113 (1973). Concerned as we are with free speech, the American Jewish Committee believes that harassment is not protected speech under the First Amendment.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms, the constitutional right to privacy, and women's rights to reproductive choice. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide.



People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend free expression as well as litigation protecting reproductive freedom. Despite the claims of petitioners and their *amici*, People For believes that these interests can both be protected in this and similar cases and that, based on the record below, the type of injunctive relief entered here narrowly and properly restricts the conduct of parties who have repeatedly harassed and violated the rights of patients and clinic workers, while leaving those parties ample avenues for free expression.

## INTRODUCTION

This case arose following a series of mass blockades at reproductive health care facilities in upstate New York.[2] Petitioners do not defend the legality of those blockades. Nor do they defend their right to physically obstruct, harass, or intimidate medical patients and staff. Instead, petitioners would like to recharacterize their conduct in more traditional First Amendment terms. The record, however, contains numerous instances of these illegal activities, as both lower courts found.

Petitioners nonetheless challenge two provisions of a preliminary injunction that was issued by the district court

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[2] These facilities are sometimes referred to in the briefs as abortion clinics. In fact, several of the facilities offer comprehensive medical services. For example, plaintiff Alexander Women's Group is located inside Genesee Hospital, a full service acute care hospital in Rochester, New York.

only after lengthy hearings clearly demonstrated that an earlier temporary restraining order had failed to prevent the very activities that petitioners now concede are illegal.

The first provision prohibits demonstrations within 15 feet of the doorway or driveway of designated reproductive health care facilities, and of persons or vehicles entering or leaving those facilities. The second provision authorizes two "sidewalk counselors" to enter this "buffer zone" and engage in face-to-face communication with any person they choose. But, if the person they are addressing indicates a desire to be left alone, the "sidewalk counselors" must "cease and desist" and rejoin the other demonstrators 15 feet away.[3]

Petitioners contend that these provisions violate the First Amendment yet ignore the extensive factual record of obstruction, harassment and intimidation that made this injunction necessary. This Court should not be misled by that tactic. The First Amendment issues raised by this case cannot be resolved in a vacuum. To the contrary, a careful review of the facts is indispensable precisely because of the important First Amendment principles that petitioners have invoked.

## STATEMENT OF THE CASE

The plaintiffs in this case include several doctors, a pro-choice organization, and a group of health care providers who offer family planning, gynecological, and abortion services at their health care facilities, which are primarily lo-

[3] The full text of the preliminary injunction is set out as an appendix to the district court opinion. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1440-41 (W.D. N.Y. 1992)("*Pro-Choice I*"). The first challenged provision is §1(b) of the injunction; the second is §1(c).



cated in Buffalo and Rochester, New York. Plaintiffs filed their complaint on September 24, 1990, and simultaneously sought a temporary restraining order against a planned blockade that defendants had announced for September 28. Each of the individual named defendants had previously been arrested for illegal activities at one or more of plaintiffs' facilities.[4]

On September 26, 1990, the district court conducted an evidentiary hearing, and on September 27 issued the requested TRO. The TRO enjoined defendants from blockading plaintiffs' facilities and from "physically abusing or tortiously harassing" people entering or leaving those facilities. It also contained "buffer zone" and "cease and desist" provisions that were later modified at the preliminary injunction stage in response to evidence of inadequacies in the original order and that, as modified, are now before this Court.

Specifically, the TRO barred demonstrations within 15 feet of any person entering or leaving an abortion facility but did not create a buffer zone around the entrances or driveways of those facilities. Similarly, it allowed "sidewalk counseling" by two defendants subject to a cease and desist provision if the person being counseled "want[ed] to leave, or walk away." It did not, however, specify how far the "sidewalk counselors" must then back off.[5]

[4] For example, Paul Schenck, one of two petitioners in this Court, was arrested and convicted on three occasions. One of those convictions was for chaining himself to other named defendants inside a Buffalo abortion facility. *See* Second Amended Complaint, ¶17. The second petitioner in this Court, Dwight Saunders, was arrested and convicted for participating in a 1989 blockade at another Buffalo abortion facility. *Id.* at ¶20.

[5] The full text of the TRO is set out in the Second Circuit's *en banc* opinion. *Pro-Choice Network v. Schenck*, 67 F.3d 377, 382 n.1 (2d Cir. 1995)("*Schenck*").

Defendants initially complied with the TRO and conducted a peaceful demonstration rather than a blockade on September 28, 1990. Unfortunately, defendants' compliance with the TRO lasted only about a month.[6] While they did not resume their earlier blockading tactics, defendants again began to congregate in the entrances and driveways of abortion facilities in large numbers, preventing automobiles from entering or in some cases even finding the driveways. They also, in the guise of "sidewalk counseling," surrounded and harassed people entering and leaving the facilities.[7]

The preliminary injunction hearing spanned 11 days in March and April 1991. In granting the injunction, the district court considered additional evidence introduced at five contempt hearings held in 1991. Based on this evidence, the district court found that defendants were continuing to engage in what the district court described as "constructive blockades." Although defendants no longer barricaded entrances or chained themselves inside abortion clinics, they still crowded cars, screamed, pushed, grabbed, and generally "forc[ed] patients to run a gauntlet of harassment and intimidation in the hope that the patients [would] turn away before entering" plaintiffs' clinics. *Pro-Choice I*, 799 F.Supp. at 1424.[8]

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[6] Defendants consented to a continuation of the TRO pending a final decision on plaintiffs' preliminary injunction motion. *Pro-Choice I*, 799 F.Supp. at 1423.

[7] The resumption of these activities is described in the testimony of several witnesses during the preliminary injunction hearing. *See, e.g.*, Tr. 64-66 (Helen Dalley); Tr.177-78 (Deborah Warnes); Tr.283, 357 (Elizabeth Sholes); Tr.540 (Marilyn Buckham).

[8] It is abundantly clear in both the district court opinion, *Pro-Choice I*, 799 F.Supp. at 1424, and the Second Circuit's *en banc* opinion, *Schenck*, 67 F.3d at 383, that the term "constructive blockade" refers to physically aggressive and constitutionally unprotected conduct of the sort described (continued...)



According to the district court, "[d]emonstrators frequently and routinely congregate[d] in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* They "crowd[ed] around people trying to enter the facilities in an intimidating and obstructing manner, and grab[bed], push[ed] and shove[d] the patients, patient escorts and staff." *Id.* In addition, the district court found that "sidewalk counselors" "harass[ed], badger[ed], intimidat[ed] and yell[ed] at the patients and patient escorts in order to dissuade them from entering" the clinics. *Id.* at 1425. Moreover, they "continue[d] to do so even after the patients and patient escorts signal[led] their desire to be left alone." *Id.*[9]

Not surprisingly, the district court found that these activities impeded the movement of pedestrian and vehicular

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[8] (...continued)
above. It does not refer to the persuasiveness or effectiveness of petitioners' constitutionally protected speech. In that sense, the term "constructive blockade" is an unfortunate one. Obstruction, harassment and intimidation can be characterized as a "constructive blockade" only in comparison to defendants' even more extreme activities that literally shut the clinics down.

[9] In light of these findings, the district court's statement that defendants' "demonstrations are usually peaceful in nature," *id.* at 1423, must be placed in context. A nonviolent demonstration can still cross the line from constitutionally protected protest to unprotected harassment, intimidation and obstruction. For example, one witness testified that "counselors" would sometimes follow patients for "several hundred feet along sidewalks or through parking lots," often "pushing, shoving, grabbing," or causing other "fairly serious bodily contact . . . forcing patients to run a kind of gauntlet . . . ." Tr.263-64 (Elizabeth Sholes). The same witness described the "sidewalk counseling" experience in these terms: "It's pretty vehement, and it's very scary. The content of the message is not even the issue. It's the sheer proximity of total strangers getting in your path . . . and the whole thing is very frightening." Tr.301.

traffic, and that such activity seriously jeopardized the health and safety of clinic patients and staff. In particular, "[t]he presence of numerous demonstrators in the driveway entrances intimidate[d] and impede[d] the drivers of cars seeking access to the parking lots of the facilities and create[d] a danger both to the occupants of the cars and the demonstrators themselves." *Id.* at 1424. Also, the district court found that defendants' "activity cause[d] stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupt[ed] the atmosphere necessary for rendering safe and efficacious health care." *Id.*

As the district court recognized, these problems are especially acute in this context because of "uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety." *Id.* at 1427. "Often times" this heightened anxiety required patients to reschedule their abortion procedures. "This delay can [also] increase the risks associated with an abortion." *Id.*[10] Finally, the district court found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Id.* at 1426.

The preliminary injunction issued by the district court responded to these very specific findings. It adopted the

[10] As the district court explained: "For some women who elect to undergo an abortion, clinical medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded, or if she becomes so distressed by the 'sidewalk counselors' that she cannot undergo surgery, the above-mentioned complications may result." *Id.*



terms of the TRO with three important modifications. It added a 15-foot buffer zone around clinic driveways and entrances in response to evidence that the TRO had not succeeded in keeping the driveways and entrances clear for ingress and egress. It provided that "sidewalk counselors" who are told to back off must rejoin the other demonstrators 15 feet away in response to evidence that the more ambiguous cease and desist provision in the TRO had not succeeded in curbing harassment by "sidewalk counselors." And it elaborated on the ban against tortious harassment in the TRO by prohibiting "sidewalk counselors" from "grabbing, touching, pushing, shoving or crowding persons entering or leaving" abortion clinics, all of which had been revealed in the record.

Only two of the fifty named defendants appealed to the Second Circuit. The original panel unanimously upheld most of the provisions of the preliminary injunction. However, by a 2-1 vote, the panel struck down the 15-foot buffer zone around clinic entrances and clinic patients, as well as the cease and desist provision applicable to "sidewalk counselors." *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994).

The portion of the panel decision invalidating these two provisions was then reversed in a 13-2 *en banc* opinion.[11] *Schenck*, 67 F.3d 377. The principal opinion for the court was written by Judge Oakes and signed by nine members of the Second Circuit. Applying the test announced by this Court in *Madsen v. Women's Health Center*, 514 U.S. __, 114 S.Ct. 2516 (1994),[12] the *en banc* court concluded that

[11] The only two dissenting votes were cast by the majority members of the original panel whose decision was overruled.

[12] The district court did not have the benefit of this Court's opinion in

(continued...)

both challenged provisions were content-neutral and restricted "no more speech than was necessary" to serve the significant governmental interests in medical safety, public safety and access to abortions. *Schenck*, 67 F.3d at 387.

In reviewing the buffer zone, Judge Oakes emphasized that demonstrators "can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by." *Id.* at 389. Furthermore, Judge Oakes noted, the ability of two "sidewalk counselors" to approach persons on an individualized basis "ensures that the injunction does not hamper [defendants'] message, only its intimidating method of demonstration." *Id.*

Likewise, Judge Oakes concluded that the cease and desist provision was not designed "to suppress speech because of the anxiety its content produces in its audience . . . but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." *Id.* at 391-92.

Echoing this approach, Judge Winter's concurring opinion, signed by ten members of the Second Circuit, stressed that "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." *Id.* at 394. Judge Meskill's dissent described this principle as "unassailable." *Id.* at 408. His disagreement with the majority dealt much more with the majority's characterization of the record than with its characterization of the law.

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[12] (...continued)
*Madsen* when it issued the preliminary injunction. Its analysis of the preliminary injunction as a time, place and manner restriction was consistent with then prevailing law. *Pro-Choice I*, 799 F.Supp. at 1432-37.



## SUMMARY OF ARGUMENT

There is no dispute in this case about the governing legal standard, which was announced by this Court only two years ago in *Madsen*, 114 S.Ct. 2516. It is also undisputed that the Second Circuit applied the *Madsen* standard when it concluded that the challenged provisions of the preliminary injunction "burden no more speech than necessary to serve a significant government interest," *id.* at 2525.

Petitioners purport to be applying the *Madsen* standard, as well, in challenging the preliminary injunction. Ultimately, however, their argument rests on the untenable proposition that any injunction in this case that goes beyond a ban on trespass and harassment automatically burdens "more speech than necessary." That argument is flawed for at least three reasons.

First, it is inconsistent with *Madsen* itself, where this Court upheld an injunction that contained anti-trespass and anti-harassment provisions along with a 36-foot buffer zone. Second, it ignores extensive findings by the district court of physical obstruction, intimidation, harassment, crowding, grabbing, and screaming; of a continuation of these problems even after entry of the more limited temporary restraining order; and of the inability of the police to assure access to the clinics without some back-off provisions and a prophylactic buffer zone. Third, it mischaracterizes the significant state interest in this case, which is not merely about protecting the property rights of clinic owners but, even more significantly, about ensuring safe and unimpeded access to reproductive health services that have a constitutional status of their own.

To be sure, the *Madsen* standard is a serious one and ought to be seriously applied. Any injunction that distances protestors from the object of their protest raises profound constitutional issues under the First Amendment for all the

reasons that this Court articulated in *Madsen*. Indeed, the *amici* organizations that have joined in this brief are most often on the side of those challenging such restrictions. But it has never been the law that the First Amendment guarantees the right to protest in any manner one chooses, or to use the occasion of a protest to physically harass, intimidate or obstruct one's ideological opponents. To the contrary, this Court has repeatedly held that the First Amendment does not immunize otherwise unlawful conduct merely because the persons engaging in that conduct have an ideological motivation. *Wisconsin v. Mitchell*, 506 U.S. __, 113 S. Ct. 2194 (1993).

As petitioners correctly point out, even content-neutral injunctions against speech are disfavored. Petitioners also correctly note that any injunction impinging on speech, even indirectly, must be narrowly drawn and tailored to the particular circumstances. However, contrary to petitioners' argument, those principles cannot resolve this controversy unless they are grounded in the facts. Assessed in light of the facts, the preliminary injunction in this case burdens no more speech than necessary to achieve significant government interests.

It is important to remember that before this case began, plaintiffs were victimized by a series of mass blockades that severely disrupted reproductive health services in the area, and that even petitioners concede were clearly illegal. During the 18 months that the TRO was in place, clinic driveways and entrances continued to be blocked, and clinic patients and staff continued to be surrounded, followed, harassed, and obstructed.

Under these circumstances, the 15-foot buffer zone created by the preliminary injunction was a measured and incremental response to an ongoing problem that threatened the health, welfare and safety of patients, staff and demon-



strators. Like the buffer zone in *Madsen*, it was directed at the conduct of the protestors, not their message. Unlike *Madsen*, it left the protestors on the same side of the street as the clinics they were picketing. Thus, even more than in *Madsen*, the protestors' chants could still easily be heard and their signs could still easily be read.

Petitioners' challenge to the cease and desist provision is similarly misguided. *Amici* fully acknowledge and have frequently advocated the importance of face-to-face communication. But the right to engage someone on the street in a political dialogue does not include the right to crowd, surround, badger, and obstruct, which is how the district court described the behavior of the defendants in this case.

## ARGUMENT

### I. THE FIRST AMENDMENT PRINCIPLES THAT GOVERN THIS CASE ARE WELL-ESTABLISHED AND LEAVE AMPLE ROOM FOR PETITIONERS' POLITICAL PROTEST

Petitioners have presented this case as a basic test of the right to engage in political protest on the street. It is not. The preliminary injunction undeniably limits petitioners' ability to engage in the sort of obstruction, intimidation and harassment that the record reveals, but such unlawful activity has never been protected by the First Amendment, nor should it be. Petitioners have also suggested that, because this case involves abortion, First Amendment principles have been sacrificed on the altar of political correctness. That argument, too, is entirely without merit. Indeed, it is probably backwards. This preliminary injunction would not have aroused the same level of controversy if the defendants were white supremacists who had repeatedly engaged in similar acts of obstruction, intimidation and harassment directed at blacks trying to register to vote.

Stripped of its rhetoric, this case is much more about facts than law. The evidence that defendants have overstepped the bounds of lawful political protest is substantial. The evidence that defendants have been prevented from delivering their anti-abortion message is virtually non-existent. *Amici*'s view of the record, therefore, is very different from petitioners' view. By contrast, there is much less disagreement over the broad First Amendment principles that govern this case. It is nonetheless helpful to restate those principles because they necessarily shape the argument that follows.

Most fundamentally, petitioners' First Amendment right to demonstrate on the public streets is beyond dispute. That right has been recognized at least since *Hague v. CIO*, 307 U.S. 496, and is integral to our notions of democratic self-government. The right to protest on the public streets, moreover, cannot be limited or abridged because of the content of petitioners' message. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). In addition, petitioners have the right to convey their message to its intended audience, *see, e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963), which in this case consists of clinic patients and staff.

Speech does not lose its First Amendment protection in a public forum because it is vituperative, *Terminiello v. Chicago*, 337 U.S. 1 (1949), or because it would be regarded as "offensive" by some, *Texas v. Johnson*, 491 U.S. 397 (1989), or because it seeks to "persuade to action, not merely to describe facts," *Thomas v. Collins*, 323 U.S. 516, 537 (1945). To the extent that Judge Winter's opinion below can be read to suggest that First Amendment speech should be judged by its effect on the "timid," *Schenck*, 67 F.3d at 396, we disagree. This Court has properly rejected broad restrictions on speech premised on the reaction of the most vulnerable audience. *Cf. Butler v. Michigan*, 352 U.S. 380 (1957).



On the other hand, the fact that one is engaged in expressive activity does not immunize otherwise unlawful activity. *Wisconsin v. Mitchell*, 113 S.Ct. 2194. Such unlawful activity may be enjoined. Still, any injunction limiting expressive activity raises serious First Amendment concerns, *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968), even if the restraint is content-neutral and the limitation on speech is incidental.

The question of how extensive the record of unlawful activity must be to justify an injunction inevitably depends on the seriousness of the unlawful activity and the scope of the injunction. Isolated, unlawful acts do not justify a broad injunction against speech, *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).[13] But this case involves neither isolated unlawful acts nor a broad injunction against speech. Rather, the challenged order was designed to protect ingress and egress from abortion clinics that had been repeatedly blocked, and to protect patients and staff that had been repeatedly harassed, over an extended period of time. Even under these circumstances, however, an injunction "must burden no more speech than is necessary," *Madsen*, 114 S. Ct. at 2525, to survive First Amendment scrutiny.

In making this judgment, the site of the protest may sometimes be relevant. What is permissible in a public park may not be permissible outside a school, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), or a medical facility.[14]

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[13] In stark contrast to the preliminary injunction here, the permanent injunction in *Claiborne Hardware* prohibited the NAACP from, *inter alia*, "picketing or patroling" any of plaintiffs' stores and from "persuading" customers not to patronize plaintiffs' businesses. 458 U.S. at 893.

[14] Contrary to the Ninth Circuit's view in *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1172 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (Mar. 5, 1996)(No. 95-1415), this premise does not lead to the

(continued...)

This regulatory principle is a limited one, however, and cannot be stretched to support the claim that speech is entitled to diminished constitutional protection whenever its message is targeted at specific individuals rather than at the public as a whole. As the AFL-CIO correctly points out in its *amicus* brief, First Amendment activity frequently relies on targeted speech in a variety of contexts from political protests to labor pickets to student demonstrations to civil rights boycotts. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 99 (1940).

As a matter of principle, therefore, we agree with the AFL-CIO that demonstrators should not be required to address the public as a whole if the object of their protest is more narrowly focused. But, unlike the AFL-CIO, we do not read Judge Winter's opinion as going so far. Rather, we read it as standing for the less troublesome proposition that physically "coercive and obstructionist" behavior, *Schenck*, 67 F.3d at 396, is more intimidating when directed at individuals than at a crowd, even in the context of a political protest. If our interpretation is incorrect, we share the concerns expressed by the AFL-CIO in its *amicus* brief.

Likewise, we agree with the AFL-CIO that individuals walking down the street should not be regarded as a "captive audience" for First Amendment purposes even if they are the intended targets of protest. Indeed, *amici* believe that there are significant dangers to applying the "captive audience" doctrine to a quintessential public forum. As this Court has often observed, all of us are subject to unwanted messages as soon as we venture outside our homes. *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970). But the

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[14] (...continued)
conclusion that the public streets outside a health care facility should no longer be regarded as a public forum. This Court's cases are clearly to the contrary. *E.g., United States v. Grace*, 461 U.S. 171 (1983).



fact that a message is unavoidable should not mean that it is inescapable. *Cohen v. California*, 403 U.S. 15, 21 (1971). The First Amendment protects listeners as well as speakers. The latter have a right to deliver their message; the former have a right to walk away without having to run a "gauntlet of harassment." *Pro-Choice I*, 799 F.Supp. at 1424.[15]

In short, *amici* do not endorse all of the Second Circuit's reasoning and language, particularly with regard to the captive audience doctrine and the significance of targeted protests. However, we continue to believe that the preliminary injunction issued by the district court is consistent with the First Amendment in light of this record and should be upheld.

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[15] When clinic patients and staff are physically prevented from "walking away" they are, in a very literal sense, "captives" of the hostile demonstrators who stand in their path. The 15-foot buffer zone imposed by the district court was a response to that problem. The buffer zone, however, does not prevent the demonstrators from delivering their message. Indeed, their continued ability to do so is critical to the First Amendment analysis in this case. The "captive audience" doctrine, by contrast, is designed to silence the message altogether out of respect for the listener's privacy interests. Thus, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), upheld a ban on all political advertising on city buses. Similarly, *Frisby v. Schultz*, 487 U.S. 474 (1988), upheld a ban on all residential picketing. Applying the "captive audience" doctrine to this case, as it was applied in *Frisby*, would mean that petitioners could not even engage in a silent vigil outside of the clinics. No one has sought that relief, and it would be indefensible under the First Amendment. For similar reasons, the notion that individuals can invoke the "captive audience" doctrine whenever "they have been sought out [by protestors] at a particular location they can avoid only at a cost," *Schenck*, 67 F.3d at 396, stretches the "captive audience" doctrine much too far. Among other things, it could be used to challenge every labor picket. This Court should not endorse that result, nor does this case require it.

## II. THE 15-FOOT BUFFER ZONE COMPORTS WITH THE CONSTITUTIONAL AND EQUITABLE STANDARDS SET FORTH IN *MADSEN*

### A. The Injunction Followed Extensive Evidentiary Hearings And Rested Upon Findings Of Obstruction, Harassment, Repeated Disobedience Of The Temporary Restraining Order, And Limited Capacity Of The Police To Maintain Unimpeded Access To The Clinics

Prior to issuing the injunction, the district court found that "[t]he demonstrators [would] crowd around people trying to enter the [health care] facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff." *Pro-Choice I*, 799 F.Supp. at 1424. It further found that "[d]emonstrators frequently and routinely congregate[d] in or near the driveway entrances to the parking lots in order to impede and obstruct access to the facilities," *id.*, and that "[o]n some occasions the drivers of and occupants of the cars trying to enter the clinic parking lots [were] so intimidated or confused by the demonstrators that they [left] the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." *Id.*

The record thus supported the district court's concern that a simple injunction directing defendants not to obstruct ingress to and egress from the medical facilities, as the TRO provided, was ineffective without the more specific protection of a buffer zone. *Id.* at 1434. Indeed, even before the events in question, the obstruction of vehicular or pedestrian traffic constituted a violation of New York Penal Law §240.20(5)(disorderly conduct). Yet neither this Penal Law provision nor the TRO deterred the obstructive activities of



defendants. Additionally, the district court found that "[l]ocal law enforcement ha[d] been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice I*, 799 F.Supp. at 1426. The court noted that "[d]efendants participate[d] in their 'rescue' activities on a continual basis and the local police [did] not have the resources necessary to monitor the situation constantly." *Id.*

Finally, five of the individual defendants were adjudged by the district court to have violated the temporary restraining order. *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018, 1028-29 (W.D.N.Y. 1993)("*Pro-Choice II*"). And, as the court further found, many of those associated with Project Rescue were "arrested on more than one occasion for harassment, yet persist[ed] in harassing and intimidating patients, patient escorts and medical staff." *Pro-Choice I*, 799 F.Supp. at 1425.

On the record, therefore, there was ample basis for the district court to conclude that its earlier, more general injunctive provisions were ineffective, and that the original 15-foot buffer around individuals (but not clinic and driveway entrances) had failed to stop these defendants from their physically obstructive and unlawful behavior.

### B. The Buffer Zone Provision Was Not Directed At The Content Of Petitioners' Speech

This Court has emphasized that injunctions directed at the content of expression bear a "heavy presumption of invalidity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and can only be sustained in the most "exceptional cases," *Near v. Minnesota*, 283 U.S. 697 (1931). In this case, however, the injunction is not directed at the content of petitioners' expression but at their obstructive behavior.

By its terms, the injunction does not focus on the content of petitioners' speech. And there is nothing in the record to suggest that, in issuing the injunction, the district court wished to suppress petitioners' message.[16]

As this Court explained in *Madsen*, in language that is equally applicable here:

> [T]he [trial] court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

114 S.Ct. at 2523-24 (emphasis in original).[17]

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[16] The cease and desist provision is also not the equivalent of a content-based "heckler's veto." *See* pp.28-29, *infra*.

[17] By contrast, the ordinance at issue in *Sabelko v. City of Phoenix*, 68 F.3d 1169, contains a "cease and desist" provision that applies to all persons engaged in "demonstration activity," regardless of whether they have engaged in prior unlawful conduct, but does not apply to anyone else. *Id.* at 1170 n.1. Thus, it is not a general harassment statute but, instead, an ordinance targeted specifically at protestors. Such selectivity in an ordinance raises serious issues of content discrimination under *Boos v. Barry*, 485 U.S. 312 (1988).



### C. The Buffer Zone Is Necessary Both To Ensure Access To The Health Care Facilities And To Protect The Health, Safety, And Reproductive Choices Of Women Undergoing Medical Treatment

The buffer zone order in this case rests upon three interests that this Court recognized as "significant" in *Madsen*. 114 S.Ct. at 2526. First, the district court and the court of appeals found the buffer zone necessary to ensure unobstructed physical access to the health care facilities. *Pro-Choice I*, 799 F.Supp. at 1433; *Schenck*, 67 F.3d at 389. Second, both the district and appellate courts concluded that the buffer zone was necessary to protect a serious and identifiable threat to the health and safety of women seeking medical treatment in these facilities. *Id.* Third, the provision was needed to ensure women's access to reproductive and family planning services, including abortion. *Madsen*, 114 S.Ct. at 2526.[18] On the record in this case, each of these interests can stand independently as "significant" justifications for the buffer zone requirement. In combination, they are more than "sufficient to justify an appropriately tailored injunction." *Id.*

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[18] Although this interest in reproductive choice represents, in some sense, a more particularized articulation of the interests in physical access to clinics and to a safe medical environment, the fact that the medical service at issue has specific constitutional protection adds weight to the reasons supporting the injunction. There is no question that there is a substantial, indeed a compelling interest in securing fundamental rights against coercive interference by private parties. *See Burson v. Freeman*, 504 U.S. 191, 198-99 (1992)(upholding 100-foot ban on electioneering outside of polling places because of history of intimidation); *see also* 42 U.S.C. §1985 (private conspiracies to deny civil rights can be redressed in an action for damages or injunctive relief).

As previously described, the record reveals that defendants' behavior seriously obstructed pedestrian and vehicular movement into and out of the health care facilities, *Pro-Choice I*, 799 F.Supp. at 1424; that such obstructive behavior -- consisting in part of surrounding women who were trying to enter and leave the clinics -- was so menacing that it jeopardized the health and safety of those women, *id.* at 1427; and that such obstructive and menacing behavior was so persistent that it required the creation of a pedestrian lane or buffer zone to allow persons and automobiles to enter and leave the clinics safely, *id.* at 1434.

Given the plain necessity for some sort of buffer zone in response to defendants' repeated unwillingness to cease their obstructive conduct in the absence of such a bright line, a 15-foot limit is hardly excessive. Significantly, petitioners have not identified even a single instance in which the 15-foot buffer zone will place them across the street from any of the clinics covered by the preliminary injunction. (This contrasts, of course, with the 36-foot buffer zone upheld in *Madsen*, which did place the demonstrators across the road from the clinic in that case.)

Petitioners criticize the "one-size-fits-all nature" of the 15-foot buffer zone. We agree that any injunction affecting speech must be tailored to the geography of the particular demonstration sites. Once again, however, petitioners' argument ignores the record. The 15-foot buffer zone was not created randomly or arbitrarily. Rather, the 15-foot distance was chosen to ensure a safe turning radius for cars entering driveways that had previously been overwhelmed by demonstrators, and to ensure safe passage for patients and staff arriving by foot who had previously been forced to walk a "gauntlet of harassment." *See* TRO Hearing, September 26, 1990. In choosing this distance as an appropriate one, the district court was fully aware that none of the demonstrators would be forced across the street at any of the sites involved



in this case.[19] Contrary to petitioners' assertion, therefore, the 15-foot buffer zone is site specific in this very practical and critical sense.[20]

### D. The Injunction Preserves Petitioners' Ability To Convey Their Message In A Meaningful And Effective Way

The 15-foot zone provides defendants with an opportunity to engage in a full range of expressive activity. Some representatives of the defendant organizations can engage in individualized, face-to-face communication with women entering the clinics in an effort to persuade them, on a personal level, that abortion is wrong. They can do so in immedi-

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[19] Diagrams of each of the clinic sites were included in the record at the preliminary injunction hearing.

[20] In addition to providing for a 15-foot buffer zone in front of the health care facilities, the injunction requires a floating 15-foot buffer zone around each "person or vehicle seeking access to or leaving" the clinics. Petitioners criticize the "floating buffer zone" on the ground that it fails to specify how far from a clinic a floating buffer zone may reach. Pet.Br. at 17. In a specific Statement of Clarification, the district court has already indicated that the "floating zone" would only apply "at the sites chosen for demonstrations," J.A.29, *i.e.*, in the immediate vicinity of the clinics. That limitation is sound, but still vague. The Second Circuit responded to this concern by suggesting that "[t]his is exactly the type of issue that is best left to case-by-case adjudication by the district court." *Schenck*, 67 F.3d at 389 n.4. Defendants, however, have a due process right to know in advance what conduct is proscribed by the preliminary injunction. *Amici* do not believe the Second Circuit's assurance that the district court "will apply a reasonable geographic scope to the phrase 'seeking access or leaving,'" *id.*, is sufficient. Since the Second Circuit has already ordered a remand, *id.* at 391, this Court should direct the district court to impose specific distances governing the reach of the "floating buffer zone" requirements at each facility.

ate proximity to the targets of their expression and without regard to the 15-foot buffer -- unless and until they are told that their continued presence is unwelcome. At the same time, others from the defendant groups can gather with like-minded individuals and stage a demonstration or carry placards at any location at least 15 feet from the clinics. In so doing, anti-choice activists can demonstrate, by the force of their numbers, how many people support their message. Moreover, inasmuch as these demonstrations or placard-carrying events can be held as close as 15 feet from the clinics, they remain well within sight and sound of the targets of the messages conveyed by the defendants. *See Madsen*, 114 S.Ct. at 2527 (one of the factors the Court considered in upholding a 36-foot buffer zone was that "[p]rotestors standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots").

For these reasons, the 15-foot zone is valid under the standard articulated by this Court in *Madsen*. The requirement rests on an ample record supporting its necessity. And, especially when read in conjunction with the provision allowing "sidewalk counseling," the injunction provides defendants with a full range of opportunities to engage in a variety of expressive activities at appropriate locations. So understood, the buffer zone cannot be found to "burden more speech than necessary."



## III. THE PROVISIONS OF THE INJUNCTION RELATING TO "SIDEWALK COUNSELING" COMPORT WITH THE APPROACH OF THE COURT IN *COHEN v. CALIFORNIA* AND, AS INTERPRETED BY THE SECOND CIRCUIT, SATISFY THE *MADSEN* STANDARD

As noted, §1(c) of the injunction allows for individualized, face-to-face communication between the defendants and those entering or leaving the targeted medical facilities. By permitting two "sidewalk counselors" to communicate directly with each patient, notwithstanding the 15-foot buffer zone, the injunction provides petitioners with a range of expressive opportunities.

Section 1(c) also provides, however, that a person who does not want to be counseled, "who wants to leave or walk away . . . shall have an absolute right to do [so] and in such event, the persons seeking to counsel that person shall cease and desist from counseling that person." As explained by the district court, this provision will only be enforced if the targeted person or group "indicates, either verbally or non-verbally, that they do not wish to be counseled . . . ." *Pro-Choice I*, 799 F.Supp. at 1434. Based on the record and as so construed, §1(c) was amply justified. The extensive evidence of harassment by "sidewalk counselors" supported the court's conclusion that without a specific back-off requirement these "counselors" would continue to crowd, follow, and otherwise harass clinic patients and staff.[21]

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[21] The court of appeals acknowledged the potential vagueness inherent in the text of §1(c) and directed the district court, on remand, to modify formally the language of the injunction to provide that the "cease and desist" requirement will only be triggered when the targets of "sidewalk counseling" "indicate[] either verbally or non-verbally that they do not

(continued...)

This Court has long recognized that there is no authority to silence a speaker merely because the expression may be distasteful to an unwilling listener or observer. *Cohen v. California*, 403 U.S. at 21; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). In *Cohen*, Justice Harlan carefully explored this issue and the competing societal concerns:

> [M]uch has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to [his] crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech" . . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 21 (citations omitted). Thus, the solution to the problem of unwanted expression offered by Justice Harlan in *Cohen* was that those offended by a particular statement "could effectively avoid further bombardment of their sensibilities simply by averting their eyes" and walking away. *Id.*

If the injunction in this case had prohibited representatives of Project Rescue from even approaching persons entering the clinics without permission on the theory that Project Rescue's message was objectionable to women who were seeking abortions, such a provision would have run afoul of the concerns articulated in *Cohen*. *See also Madsen*, 114 S. Ct. at 2529, *quoting Boos v. Barry*, 485 U.S. at 322. But the injunction here is not nearly so restrictive. It permits defendants to approach and communicate with those entering the medical facilities, even if their message is disagreeable to the clinics' patients and staff. However, the injunction provides that, when those who are personally confronted in a face-to-face physical encounter with "sidewalk counselors" indicate that they have heard enough and do not want to be "harass[ed], badger[ed], intimidate[d]" or surrounded by people yelling in their ear, *Pro-Choice I*, 799 F. Supp. at 1425, the "counselors" must stop their pursuit, back off, and return to the demonstration area or else approach a different person.

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[21] (...continued)
wish to be counseled." *Schenck*, 67 F.3d at 391. Although this modification represents a significant improvement in the text of the provision, *amici* believe that the provision should be further improved and any ambiguity in its operation additionally reduced by limiting it to circumstances where the target indicates verbally that she or he does not wish to be counseled. Such a modification would eliminate any potential misunderstanding created by nonverbal communication.

Petitioners continue to insist that "sidewalk counselors" should have no obligation to retreat even when requested to do so by an unwilling listener who is seeking to walk away. But petitioners fail to cite any case upholding the right to harass, intimidate or obstruct individuals walking down the street, for an entire city block, after they have asked to be left alone. At its heart, the "cease and desist" provision is directed at this sort of behavior. It is intended to permit individuals to follow Justice Harlan's suggestion in *Cohen* and walk away. Nothing in *Madsen* can fairly be read as deviating from the "walk away" approach urged by the Court in *Cohen*.[22]

Contrary to petitioners' claims, the "cease and desist" measure does not create a "heckler's veto" of the sort previously condemned by the Court. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). A "heckler's veto" is an attempt to prevent a speaker from communicating with the public at large merely because one or more individuals are offended by the speaker's message. In this case, by contrast, the cease and desist provision merely permits patients and staff to walk away from a face-to-face confrontation with "sidewalk counselors" whose willingness to engage in acts of physical harassment and intimidation is

[22] *Madsen* involved a prohibition against *all* face-to-face uninvited speech. Although the *Madsen* Court recognized -- as did *Cohen* -- that "citizens must tolerate insulting and even outrageous speech," 114 S.Ct. at 2529, nothing in *Madsen* suggests that protestors can claim First Amendment protection when they surround or obstruct citizens trying to walk away from an unwanted message by proceeding unimpeded toward their intended destination.



amply demonstrated in this record.[23] The rebuffed "street counselor" is in no way prevented from communicating with the public or with other possibly more receptive recipients of his message. Thus, the "street counselor" can continue to communicate in the demonstration site area -- a mere 15 feet from the clinic entrance -- and can approach any other pedestrian. So understood, the "cease and desist" provision creates no more of a heckler's veto than does a person who refuses to accept an unwanted leaflet from a sidewalk pamphleteer or who hangs up the telephone in response to an unwelcome caller, or an individual who asks the post office not to deliver unwanted mail to her home. *See Rowan v. U.S. Post Office*, 397 U.S. at 736-37.

[23] The Second Circuit stressed that the cease and desist provision is intended to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators," *Schenck*, 67 F.3d at 392, and "not . . . to suppress speech because of the anxiety its content produces in the audience." *Id.* at 391. This interpretation is consistent with the contempt proceedings brought under this provision. *E.g., Pro-Choice Network v. Walker*, 994 F.2d 989, 992 (2d Cir. 1993). Thus, we do not believe the cease and desist provision can fairly be construed, or has been applied, to prohibit a "sidewalk counselor" from politely and unobtrusively asking a patient to reconsider her initial refusal to talk. If there is any ambiguity in that regard, this Court can clarify it. It bears emphasis again, however, that this record does not reflect such innocent activity.

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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